IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 16TH OCTOBER 2007 / 24TH ASWINA 1929

FAO.No. 173 of 2007()

AGAINST THE ORDER DATED 30/11/2006 IN IA.940/2006 IN AS.17/2005 of SUB COURT, HOSDRUG

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APPELLANT/PETITIONER/APPELLANT:

V. BALAN, AGED 50 YEARS,
S/O. KUNHAMBU NALPADY, RESIDING AT VAIKKATH,
NORTH TRIKARPUR VILLAGE , P.O. UDINOOR,
HOSDURG TALUK.

BY ADV. SRI.SURESH KUMAR KODOTH

RESPONDENT: RESPONDENT/RESPONDENT:

M.GOPALAN, AGED 60 YEARS,
S/O. PRIKINTE AMBU, RETIRED PROCESS SERVER,
RESIDING AT MANIYAT, MANIYAT VILLAGE, P.O.MANIYAT,
HOSDURG TALUK.

BY ADV. SRI.V.N.RAMESAN NAMBISAN

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 16/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.R.RAMAN & V.K.MOHANAN, JJ.

F.A.O.NO.173 OF 2007

Dated this the 16th day of October, 2007

JUDGMENT

Raman, J.

This is an appeal against the order dismissing the application filed under Order 41 Rule 19 of the C.P.C. for readmission of the appeal, which was dismissed for default on 15/9/2006. On the day on which the case was posted, junior counsel appeared and submitted that senior counsel is suffering from fever, cold etc. and sought for an adjournment of the matter. But the court below dismissed the appeal for non-appearance. It was subsequently that the present application was filed. No counter affidavit however was filed by the respondent. I.A.No.933/2006 was filed on the same day on which the appeal was dismissed, seeking for adjournment. The court below came to the conclusion that I.A. was filed only after the dismissal of the appeal. In this regard it should be appreciated that the affidavit sworn into by the Senior Advocate is to the effect that his junior sought for an adjournment. Since there was no written application, the court insisted for written application and in order to prepare the same, he

went outside the court and subsequently when the case was called, his junior had not returned and hence the appeal was happened to be dismissed. When the respondent has not filed any counter affidavit, normally the facts as stated should be taken as beyond dispute. At any rate, the matter could not have been viewed so strictly to prevent the appellant's right of being heard, especially when the default is not on the part of the client, but on the part of the counsel.

In such circumstances, we set aside the order passed by the court below and allow this appeal. The application for re-admission of the appeal is allowed. The appellate court shall dispose of the appeal on merits, after hearing both sides. The parties shall appear before the Appellate Court on 14/11/2007.

Sd/-
P.R.RAMAN,
Judge.

Sd/-
V.K.MOHANAN,
Judge.

kcv.